In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY,
Petitioner,

vs.

SNYDER'S DRUG STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Properly stated, the single question presented is whether the North Dakota District Court and North Dakota Supreme Court correctly held that, on the record before them, Section 43-15-35(5) of the North Dakota Century Code violates the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution because a statutory requirement limiting ownership of pharmacies to pharmacists or to corporations controlled by pharmacists does not bear a rational relationship to the public health, safety and welfare.

STATEMENT

Although substantially correct, the petitioner's statement of the case is not sufficiently complete to present properly the background for the decision by the North Dakota Supreme Court.

This lawsuit arises out of the five-year effort of the respondent, Snyder's Drug Stores, Inc., to establish a pharmacy in the Red Owl Family Center in Bismarck, North Dakota. The attempt commenced in May of 1968 when Family Center Drug Store, Inc. submitted to the North Dakota State Board of Pharmacy an application for a permit to operate a pharmacy. After a lengthy series of hearings, delays and appeals, the denial of the application by the State Board was upheld by the North Dakota Supreme Court on December 4, 1970, more than two and a half years after the initial application had been made. *Family Center Drug Store, Inc.* v. *North Dakota State Board of Pharmacy*, 181 N.W.2d 738 (N.D. 1970).

The North Dakota court's decision in the earlier case rested on its finding that Family Center Drug Store was under the actual control of Red Owl and Snyder's Drug Stores and that consequently Family Center Drug Store did not have a separate legal existence. 181 N.W.2d at 745. The court thus looked to whether or not Red Owl and Snyder's complied with Section 43-15-35(5) of the North Dakota Century Code requiring a majority of stock of a corporate applicant for a permit to operate a pharmacy to be owned by a registered pharmacist in good standing in North Dakota, and found that the requirement was not met. 181 N.W.2d at 746. The court did not, however, reach the issue of whether Section 43-15-35(5) was un-

constitutional because that issue had not been raised prior to the appeal. 181 N.W.2d at 745.

After receiving the adverse decision, Snyder's Drug Stores applied directly to the State Board for a permit to operate a pharmacy at the Red Owl Family Center. (Application for Permit, A.3-4) The application indicated that if the permit was granted, the pharmacy would be "conducted in full compliance . . . with existing laws, and with the regulations of the Board of Pharmacy." (Application for Permit, A.3) Snyder's also represented that proper sanitary conditions would be maintained, that required equipment and cabinets would be provided, and that Kenneth Swanson, a pharmacist registered and in good standing in the State of North Dakota, would be actively and regularly employed in and responsible for the management, supervision and operation of the pharmacy. (Application for Permit, pars. 12 & 13, A.4; Affidavit of Lloyd Berkus and Richard C. Johnson, par. 7, A.7) He in turn would be supervised by Irwin Livon, a pharmacist registered and in good standing in the State of Minnesota and the director of professional services for Snyder's. (Affidavit of Lloyd Berkus and Richard C. Johnson, par. 6, A.7) The application and the attached affidavit effectively established that Snyder's did or would meet all of the requirements of Section 43-15-35 for the issuance of a permit with the exception of the ownership requirement in subsection (5).

Subsequently on March 22, 1971, and without any kind of a hearing, the State Board summarily denied the permit, both because Snyder's failed to meet the ownership requirements of Section 43-15-35(5) and because the proposed pharmacy would, allegedly, fail to meet certain structural and safety standards imposed by the State Board. (Administrative Findings of Fact, etc., A.12-15)

On April 12, 1971, Snyder's filed its notice of appeal to the North Dakota District Court from the denial. (Notice of Appeal, A.15-16) The company alleged that Section 43-15-35(5) was unconstitutional and that there was no evidence to support the State Board's finding with respect to the adequacy of the proposed structural and safety provisions. (Specifications of Errors, A.16-18)

Six months later, on November 16, 1971, Snyder's served and filed a motion for summary judgment. (Motion for Summary Judgment, A.19-20) Two affidavits attached to the motion dealt with plans for the proposed pharmacy and the operation of other similar businesses in North Dakota. (Affidavit of Lloyd D. Berkus, A.20-22; Affidavit of C. Nicholas Vogel, A.22-23) A hearing on the motion was scheduled for December 3, 1971.

The return of the petitioner was filed on the day of the hearing with no attached or accompanying affidavits. (Return to Motion for Summary Judgment, A.23-24) Since no countering affidavits were ever submitted by the State Board, the record before the trial court consisted of Snyder's application for a permit, its supporting affidavits and the federal and state rules and regulations governing the distribution and sale of drugs in North Dakota.

Following the oral arguments on the summary judgment motion, the district court held in favor of Snyder's Drug Stores on both the constitutional issue and the issues concerning the adequacy and legality of the Board's findings in other areas. (Findings of Fact, etc., A.24-32; Summary Judgment, A.32) In particular, the trial court concluded that the ownership requirements of Section 43-15-35(5) do not bear a reasonable relationship to the public health, safety and welfare and are not expedient and necessary for the protection of the public, and that consequently the statute violates the Due Process Clause of the Federal

Constitution. (Findings of Fact, etc., pars. IX & XI, A.30, 31)

On April 4, 1972, the State Board filed its notice of appeal to the North Dakota Supreme Court from the judgment granting Snyder's motion for a summary judgment. (Notice of Appeal, A.33) The specifications of error attached to the notice encompassed every conclusion made by the trial court. (Specifications of Error, A.34-37)

On October 31, 1972, the North Dakota court rendered its decision. It held that, on the record before it, Section 43-15-35(5) of the North Dakota Century Code was unconstitutional. In arriving at this decision, the court specifically noted that as in *Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1928), the State Board did not present any evidence on the constitutional issue to the trial court and gave no assurance to the Supreme Court that specific evidence justifying the legislation could be submitted on remand:

> "Having no assurance from the Board of Pharmacy that specific evidence lacking in *Baldridge* and so far lacking in the instant case could be supplied on a remand, notwithstanding the Board's request that this case be remanded to the trial court with instructions to remand to the Pharmacy Board for an evidentiary hearing on the constitutional issue, and because of the Board's failure to this date to produce such evidence, we hold that this request comes too late.
>
> "Being bound by the decision of the United States Supreme Court in *Baldridge*, and seeing insufficient basis for distinguishing that decision from the instant case, we sustain the trial court's conclusion that Section 43-15-35(5), N.D.C.C., violates the due-process clause of Section 1 of the Fourteenth Amendment to the United States Constitution."

202 N.W.2d at 144.

The North Dakota court did, however, find genuine issues of material facts with respect to the safety and structural provisions and remanded to the State Board of Pharmacy for an administrative hearing on those issues. 202 N.W.2d at 145. A judgment on remittitur was entered against the State Board on January 4, 1973. On February 20, 1973, the Board filed its petition for a writ of certiorari seeking review of the judgment, and the petition was accepted by this court on April 23, 1973.

SUMMARY OF ARGUMENT

The basic theme of the petitioner's argument is that the United States Supreme Court's decision in *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928) is out of date and should be reversed. The petitioner misconstrues the *Liggett Company* holding. Whatever may have been the prevailing attitude of the Supreme Court members with respect to state and federal legislation during the first thirty years of the twentieth century, two aspects of the *Liggett Company* decision stand out and are still good law today.

The first involves the applicable standard of review of legislation sought to be sustained as a valid exercise of a state's police power. To sustain such a contention, the court held that the statute must bear "a real and substantial relation to the public health, safety and morals, or some other phase of the general welfare." 278 U.S. at 111-112. None of the Supreme Court decisions since 1928 have radically altered this formulation of the standard for reviewing legislation sought to be held under the state's police power. Even today there still must be some kind of evil the legislation was designed to remedy and the legislation must in fact have some tendency to correct the evil or otherwise be rationally related to it.

The second aspect of the *Liggett Company* decision involves the obligation of those seeking to uphold the legislation to produce at least some evidence to show the alleged rational connection between the legislation and a permissible public purpose when a suspect statute is challenged and the challenger shows that the legislation apparently adds nothing to the protection of the public health, safety and welfare. The court held that if the other party fails to come forward with at least some evidence showing or suggesting a rational basis for the legislation, the legislation cannot be upheld. 278 U.S. at 113, 114.

In this case, the evidence presented by Snyder's in the form of affidavits, state and federal statutes and the State Board's own regulations established that in North Dakota the restrictive ownership legislation of Section 43-15-35(5) in no way promoted the health, safety or welfare of the people of North Dakota. Such evidence gave firm support to the conclusion of the trial court and the North Dakota Supreme Court that the statute failed to comply with the reasonableness standard.

The petitioner, on the other hand, failed to produce any evidence supporting its contention that a statute restricting the ownership of pharmacies to pharmacists or corporations controlled by pharmacists has some relation to the public health, safety and welfare. No affidavits or other documents were submitted to the district court at or prior to the summary judgment hearing to establish a reasonable relationship between the legislation and the public health or even to indicate that such evidence might be forthcoming at trial. Such affidavits are required by Rule 56(e) of the North Dakota Rules of Civil Procedure, which prohibits an adverse party from resting "upon the mere allegations or denials of his pleading," and requires him to "set forth specific facts showing that there is a

genuine issue for trial." In the absence of any evidence tending to establish a rational relationship between the ownership requirement of Section 43-15-35(5) and the public health, safety and welfare and on the basis of the evidence presented by Snyder's showing there was no such relationship, the North Dakota District Court and the North Dakota Supreme Court had no alternative except to find the legislation unconstitutional.

The rationalizations suggested by the State Board of Pharmacy to sustain the legislation are completely unsubstantiated by any evidence appearing in the record of this case and cannot stand up under scrutiny. The arguments, at best, illustrate only an irrational aversion to chain stores.

Cases upholding legislation prohibiting doctors from owning pharmacies and prohibiting corporate ownership and control over professionals who deal intimately and closely with individual members of the public likewise cannot sustain the legislation held unconstitutional by the North Dakota District Court and the North Dakota Supreme Court.

ARGUMENT

I.

In Liggett Co. v. Baldridge, This Court Held That Legislation Sought to Be Upheld Under the State's Police Power Must Bear a Reasonable Relationship to an Evil or Problem Affecting the Public Health, Safety and Welfare. This Standard Is Still Applicable Today.

The first three sections of the petitioner's brief constitute an appeal for a reversal of this court's decision in *Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1928).

In that case, the State of Pennsylvania sought to uphold legislation restricting the ownership of pharmacies to pharmacists as a valid exercise of its police power. 278 U.S. at 111. After noting that the operation of a business is a property right protected by the Fourteenth Amendment and that corporations are persons within the meaning of the Fourteenth Amendment, 278 U.S. at 111, the Supreme Court, through Justice Sutherland, declared that the state could sustain its exercise of the police power "only when such legislation bears a real and substantial relation to the public health, safety, morals or some other phase of the general welfare." 278 U.S. at 112.

Upon reviewing the record, Justice Sutherland found no evidence tending to supply the necessary rational connection:

> "In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or

> substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion."

278 U.S. at 113.

Justice Sutherland's formulation of the standard for reviewing legislation sought to be upheld as a valid exercise of the state's police power has not substantially changed in the past forty-five years. For example, as recently as 1962, in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, Justice Clark, speaking for a unanimous court, stated a similar standard as follows at pages 594-595:

> "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in Lawton v. Steele, 152 U.S. 133, 137, 38 L ed 385, 388, 14 S.Ct. 499 (1894), is still valid today:
>
> > " 'To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' "

The Court's decisions involving the right of privacy and job qualifications have also indicated, at the very least that state legislation restricting personal liberty must at least have a reasonable relationship to the public health

and safety. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Roe* v. *Wade*, ... U.S. ....., 35 L.ed.2d 147 (1973); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1951).

The state courts, even in the realm of economic regulation, have also applied a reasonableness test in reviewing legislation under the due process clause. See, for example, the North Dakota court's language in *Bob Rosen Water Conditioning Co.* v. *City of Bismarck*, 181 N.W.2d 722, 724-25 (N.D. 1970); *Fairmont Foods Co.* v. *Burgum*, 81 N.W.2d 639, 646 (N.D. 1957). See also 16 *Am.Jur.2d, Constitutional Law*, §§ 277 & 279.

Even the petitioner admits that state legislation should meet the reasonableness test, for the State Board does not assert that the legislation is acceptable under a different due process standard. Rather, it argued on page 13 of its petition for a writ of certiorari that the statute meets the *Liggett Company* test in that it "bears a real and substantial relation to the public health, safety, morals and general welfare," and in its brief the State Board asserts that the statute is "properly related" to the public health, safety and welfare. (Petitioner's Brief, p. 21).

It may be true that in the past the Supreme Court has misapplied this standard in order to strike down legislation which its members thought was unwise or contrary to their own economic philosophy. See *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963); *Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, 488 (1955). The fact that during the years before and after the *Liggett Company* decision was rendered the Supreme Court referred to the standard in striking down legislation it thought unwise does not, however, necessarily mean that the standard was also misapplied in that case or that the standard enunciated by the Court at that time has no application today.

Surely, the courts have not completely abdictated to the state legislatures the responsibility for protecting persons, including corporations, from legislation which bears no reasonable relation to admitted areas of state concern, such as the public health and safety, simply because economic regulation involving jobs and property ownership is involved rather than an unreasonable legislative infringement on other areas of freedom and liberty clearly protected by the due process clause.

In both areas legislative action should be subject, at a minimum, to a reasonableness standard and effective judicial review. Certainly, there is no reason in logic or in history to limit the "liberty" referred to in the Fourteenth Amendment to only those areas where economics and jobs are not involved. As at least one commentator has noted, from a practical standpoint an individual's right to better his economic position is as important to him as many First Amendment rights:

> "It should hardly be necessary to state that the right to engage in a gainful occupation and to seek to better one's economic position is of basic importance to the individual. From a practical standpoint, this right is as important, and as deserving of protection as are First Amendment rights."

Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 Nw. U. L. Rev. 226 (1958). See also McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," 1962 Sup. Ct. Rev. 34 at 48.

Thus, the cases and judicial consistency still require that if legislation is sought to be upheld under the state's police power it must meet the reasonableness test, even where economics, jobs and property ownership are involved.

II.

The Conclusion of the District Court That Section 43-15-35(5) Bears No Reasonable Relationship to the Public Health, Safety and Welfare Was Compelled by the Evidence Before That Court. Since the State Board Failed to Produce Any Evidence at Any Stage of the North Dakota Proceedings Tending to Establish Any Reasonable Connection Between the Statute and the Public Welfare, the Conclusion of the Trial Court Must Stand.

Following his review of the application for a permit and the affidavits submitted by Snyder's Drug Stores and various applicable federal and state statutes and regulations, the district court concluded that the ownership requirement of Section 43-15-35(5) was not reasonable and bore no real relation to the public health, safety or welfare:

> "The requirement that a majority of the stock of a corporate applicant for a permit to operate a pharmacy in the state of North Dakota be owned by registered pharmacists in good standing in North Dakota is not a reasonable requirement; it does not bear a definite relation to the public health, safety, and welfare and is not expedient and necessary for the protection of public health, public safety, public morals or public welfare. The requirement has no real, substantial relation to public objects which the government may legally accomplish, since it adds nothing to the legitimate regulation of drugs, pharmacists and pharmacies in the state of North Dakota, all of which are already closely and directly regulated by various federal and state statutes and agencies."

(Findings of Fact, etc., par. IX, A.30)

His conclusion finds clear support in the record. The North Dakota statutes and regulations show that North Dakota, like Pennsylvania at the time of the *Liggett Company* decision, closely regulates the manufacturing, labeling, prescribing, compounding, purchasing and selling of drugs and medicines by appropriate legislation. Only registered pharmacists or their assistants or licensed physicians, for example, can manufacture, compound, sell or dispense poisons, medicines and chemicals for medicinal use in the state. *N.D.C.C.* § 43-15-14. The management of pharmacies must be under the personal charge of a pharmacist duly registered under the laws of the state. *N.D.C.C.* § 43-15-35(4). All pharmacies must be equipped with proper pharmaceutical and sanitary appliances and have the equipment necessary to fill prescriptions accurately and properly. *N.D.C.C.* § 43-15-35(2) & (3); Regulations of the North Dakota Board of Pharmacy, § 12. Pharmacists who mislabel drugs or improperly fill out prescriptions are subject to criminal penalties. *N.D.C.C.* § 43-15-43. Pharmacists must also meet stringent requirements in order to be registered at all within the state. *N.D.C.C.* § 43-15-15. Narcotics, depressants, stimulants, hallucinogenic drugs, and other substances subject to abuse are closely regulated by the state laboratories under the new Uniform Controlled Substances Act passed by the 1971 session of the North Dakota legislature. *N.D.C.C.* Chap. 19-03.1. Drugs are also closely regulated in order to insure strict compliance with standards of purity, strength and quality. *N.D.C.C.* § 19-02.1-13. In addition, the federal authorities closely oversee the manufacturing, labeling and sale of drugs. 21 *U.S.C.A.* §§ 351 *et seq.*, 21 *C.F.R.* §§ 130.1 *et seq.* Thus, in North Dakota, as in Pennsylvania at the time of the *Liggett Company* decision, drugs in all forms are closely regulated and controlled by state and federal agencies.

Snyder's application and affidavits indicated that a registered pharmacist would be responsible for the management, supervision and operation of the pharmacy at all times. (Affidavits of Lloyd Berkus and Richard Johnson, par. 7, A.7) He, in turn, would be supervised by another registered pharmacist registered in Minnesota. (Affidavits of Lloyd Berkus and Richard Johnson, par. 6, A.30) The new pharmacy would have the references and equipment required by the State Board and would maintain proper sanitary conditions. (Application for Permit, pars. 8-13, A. 3-4) Except for the ownership requirement, the pharmacy would be operated in full compliance with existing North Dakota and federal laws and with the valid regulations of the State Board. (Application for Permit, A.3) In general, the proposed pharmacy at the Red Owl Family Center would be a model pharmacy in full compliance with all statutes and regulations with the one exception.

Under such circumstances the district court's finding and conclusion that the ownership requirement of Section 43-15-35(5) failed to meet the reasonableness standard is certainly not clearly erroneous and in fact was compelled by the evidence in the record.

Actually, there was nothing in the record before the district court which would support any other finding or conclusion, for in this case the State Board failed to produce at the district court level or even before the North Dakota Supreme Court any evidence tending to justify the legislation as a valid exercise of the police power.

Such a failure is inexcusable. At least from the time Snyder's Drug Stores filed its application for a permit in January, 1971, the State Board must have been well aware that the constitutionality of the ownership requirement would be challenged through a judicial proceeding. If evidence tending to substantiate the statute actually

existed, the State Board should and could have started at that point to gather such evidence. Certainly, by the time the motion for summary judgment was submitted some six months later the State Board should have had at least some idea of the evidence, if any, it would be relying upon to support the legislation, and should have prepared the necessary affidavits indicating that there was an issue of fact with respect to the constitutionality of the legislation. Yet, it never submitted any affidavits or made any offer to produce or even gave any indication to the district court that it would produce evidence relating to the constitutionality of Section 43-15-35(5).

Under Rule 56(e) of the North Dakota Rules of Civil Procedure, it is incumbent upon a party responding to a motion for summary judgment to set forth such specific facts that it may have showing that there is a genuine issue for trial:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

N.D.R.Civ.P. 56(e). See *Ray* v. *Northern Sugar Corp.*, 184 N.W.2d 715, 718 (N.D. 1971).

The rule thus does not permit the Board to withhold its evidence, much less an announcement that it has some evidence, until the time of appeal. See 6 *Moore's Fed. Practice*, par. 56.15(6) at 2424.

The North Dakota District Court and the North Dakota Supreme Court thus had the same problem which faced

this Court in *Liggett Co.* v. *Baldridge, supra.* In that case, this Court felt compelled to hold that the Pennsylvania statute limiting the ownership of pharmacies to pharmacists failed to meet the due process requirements, at least in part because the record before it would permit no other conclusion:

> "In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. *No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that probably could give rise to a different conclusion. . . . If detriment to the public health thereby [through the operation of chain drug stores] has resulted or is threatened, some evidence ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists.*" [Emphasis added]

278 U.S. at 113-14.

This same language was cited and emphasized by the North Dakota Supreme Court in its decision. *Snyder's Drug Stores* v. *North Dakota State Board of Pharmacy,* 202 N.W.2d 140, 144 (N.D. 1972). It, too, noted the complete lack of any evidence demonstrating a rational connection between the ownership requirement of Section 43-15-35(5) and the public health and safety:

> "Having no assurance from the Board of Pharmacy that specific evidence lacking in *Baldridge* and so far lacking in the instant case could be supplied on a re-

mand, notwithstanding the Board's request that this case be remanded to the trial court with instructions to remand to the Pharmacy Board for an evidentiary hearing on the constitutional issue, and because of the Board's failure to this date to produce such evidence, we hold that this request comes too late."

202 N.W.2d at 144.

To reopen the proceedings at this point simply because the State Board now indicates that it may have some experts to testify on its behalf, a request already denied by the North Dakota Supreme Court both on the appeal and on the petition for rehearing, is not justified under either the *Liggett Company* decision or the North Dakota Rules of Civil Procedure. The State Board had a fair opportunity during this litigation to present whatever evidence it had, and it failed to present anything. The five-year effort of Snyder's to secure a permit in North Dakota should at long last be rewarded.

III.

The Rationalizations Now Suggested by the Petitioner to Support the Legislation Are Not Persuasive and Find No Support in the Record.

The various rationalizations outlined by the State Board to uphold the statute as "related" to the public health, safety and welfare cannot stand up under scrutiny. The arguments, taken together, illustrate only an irrational aversion to chain stores.

The basic accusation is that corporations or chain stores are more profit oriented than owner-pharmacists, and that these companies will consequently force their pharmacists, all of whom would be duly registered, tested and qualified to practice in North Dakota, to permit drugs

to deteriorate, to accept low quality work, and otherwise to act in a manner detrimental to the citizens of the State of North Dakota. There was, of course, no evidence submitted at the trial court level to substantiate any of these unfounded accusations; there was not even any assertion that specific facts supporting the claims would be produced at trial.

On the contrary, the evidence before the trial court—to the effect that a multitude of federal and state statutes and regulations already closely regulate the sale and quality of drugs in the state of North Dakota, that a qualified pharmacist would be in charge of the management and operation of the pharmacy and that the pharmacy would comply with all valid rules and regulations of the State Board of Pharmacy—showed no relation between the legislation and the public health, safety and welfare of the people of North Dakota.

The successful operation of chain drug stores in practically every state of the Union but North Dakota and of the corporate pharmacies operating in North Dakota under the grandfather clause clearly demonstrates that the service provided the public by these stores is more than adequate and certainly constitutes no threat to the public health or welfare. Our research, in fact, has shown that only one other state, Michigan, has restrictive pharmacy ownership legislation similar to that in North Dakota, and the Michigan statute was thought to be unconstitutional by four of five judges speaking to the constitutional issue. *Superx Drugs Corp.* v. *Michigan Board of Pharmacy*, 146 N.W.2d 1, 10-19, 19-23 (Mich. 1966). Three of the judges found in favor of the drug company without reaching the constitutional issue, *ibid* at 5-10; and only one judge thought the legislation constitutional, *ibid* at 1-5. Thus, even in the one other state with such legislation, the statute is on shaky grounds.

On an individual basis, each of the seven explanations advanced by the Board to support the statute is either not applicable to the present case or is completely unsupportable or both. For example, with respect to the suggestion that corporate pharmacies would permit their drugs to deteriorate (Claim No. 1), federal statutes require special labeling for drugs liable to deterioration. 21 *U.S.C.A.* § 352(h). Regulations issued in compliance with this statute require drugs to bear an expiration date which is either set by the detailed regulations with respect to each drug or is set after the drug manufacturer establishes to the satisfaction of the government the length of time a particular drug will remain stable. See 21 *C.F.R.* §§ 148.3 (a)(3) & 148.3(b)(5). Streptomycin tablets, for example, must have an expiration date of 24 months, unless the manufacturer produces sufficient proof that a particular batch will have a longer stable life. See 21 *C.F.R.* § 146b.-104(c)(1)(i). The Federal Regulations then provide that drugs cannot be disposed of through either commercial or charitable channels after the expiration date expires, unless their potency has been redetermined. 21 *C.F.R.* § 146.9.

On the state level, the legislature has also enacted statutes to insure that drugs comply with strict standards of purity, strength and quality. *N.D.C.C.* § 19-02.1-13. The Board of Pharmacy could directly discipline any pharmacist or drug store which attempts to sell drugs not meeting these standards.

The fourth explanation and part of the first explanation offered by the Board concern problems that might result because the pharmacists would be supervised by an untrained manager. In the present case, this could not happen at the local level because the drug store would be under the supervision and management of a qualified pharmacist. (Affidavit of Lloyd Berkus and Richard John-

son, par. 7, A.7) This pharmacist would in turn be supervised on a regional level by another Snyder's pharmacist registered and in good standing in the State of Minnesota. (Affidavit of Lloyd Berkus and Richard Johnson, par. 6, A.7) In any event, there were absolutely no facts or other proof offered to the trial court by the State Board which would support the accusation that pharmacists in chain drug stores are less accountable or less proficient or less responsible than those in drug stores owned by pharmacists.

Part of the second and fifth explanations offered by the Board concern accountability for illegal or detrimental acts. The Board seems to think that licensed pharmacists employed by corporations in North Dakota will commit illegal acts when told to do so by their employers and that they will then deny responsibility along with the corporation. An employee cannot, of course, avoid responsibility for illegal acts on the grounds he was told to commit them by his employer. To the extent that the corporation ordered, approved of or otherwise participated in an illegal act, it too would be responsible. 21 *Am.Jur.2d, Criminal Law* § 133. For civil wrongs committed by its employees, the corporation would typically be liable under the doctrine of respondeat superior. 53 *Am.Jur.2d, Master & Servant* § 404. Locating responsibility for acts of corporate agents is no real problem today.

The sixth rationalization and part of the third and fifth rationalizations proffered by the Board concern the problem of commercialism in corporate pharmacies. Again, this excuse for the statute does not stand up under scrutiny. For one thing, there is absolutely nothing to support the accusation that chain stores or other corporate pharmacies are any more profit oriented than owner pharmacists. In fact, the apparent desire on the part of independent own-

ers-pharmacists to limit entry into the retail drug market, thereby raising drug prices and their own profits, clearly demonstrates a strong profit orientation which might cloud their own service responsibilities. Furthermore, the presence of capable, licensed pharmacists in charge of and responsible for the mixing and dispensing of drugs at the proposed pharmacy insures that the public will be adequately protected. The successful operation of chain drug stores and corporate pharmacies in numerous other jurisdictions, as well as those currently operating in North Dakota, clearly indicates that the fears of the State Board are completely unfounded.

The seventh reason, restricting doctor-owned pharmacies, may have some legitimacy. The legislative history of the statute in fact suggests that this was the single argument offered to the North Dakota legislators to sustain the statute. The minutes of the House General Affairs Committee for March 1, 1963, for example, indicate concern only over the encroachment of doctors and clinics into the pharmacy business. (A copy of those minutes is appended to this brief.) Chain operations were not even mentioned.

The device of prohibiting all corporations not themselves controlled by pharmacists from owning pharmacies, however, is not a reasonably necessary means of eliminating doctors, and the statute must fall for this reason. As Justice Clark, quoting from *Lawton* v. *Steele*, 152 U.S. 133, 137 (1894), observed in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962), at page 595:

> " 'To justify the State in . . . interposing its authority in behalf of the public, it must appear . . . second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals'."

Cf. *Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965). Surely a statute, whose sole purpose is to prevent doctors from owning pharmacies, cuts an unconstitutionally broad swath if it attempts to accomplish this arguably legitimate goal by prohibiting everyone except pharmacists from owning pharmacies. Consequently, this reason is by itself insufficient to support the statute.

In summary, then, none of the rationalizations offered by the State Board can sustain this legislation on the basis of this record. Rather the record establishes that Section 43-15-35(5) violates the Due Process Clause of the Fourteenth Amendment.

IV.

The Treatment by Other States of Dentists, Doctors, Lawyers, Optometrists and Other Professionals Who Deal Directly and Closely with the Members of the Public Does Not Support the Legislation Restricting the Ownership of Pharmacies in North Dakota to Pharmacists. Other State Court Cases Cited by Petitioner Are Distinguishable.

The various state court cases cited on pages 22-27 of the State Board's brief are not relevant to the present action, since they do not involve professions and businesses similar to drug stores and pharmacies. Unlike pharmacies and drug stores, dentistry, optometry, medicine, and other similar professions involve close personal contact between the person seeking the service and the person giving the service. In many, if not most, cases of drug purchases, the purchasers do not even know the druggist, and certainly have very little personal contact with him.

The parallel noted in the article in 141 *Notre Dame Lawyer* 49, quoted on pages 25 and 26 of the State Board's

brief, clearly demonstrates the difference. As pointed out in that article, the relationship between a physician and a pharmacist on the one hand and an optometrist and an optician on the other hand is quite similar. The optometrist and the physician work closely and personally with the client or patient. The optician and the pharmacist, on the other hand, merely distribute to that client or patient the materials or medicines prescribed by the optometrist or the physician. The optometrist and the physician, because of the close and personal nature of their contact with the person seeking the service cannot in some states be subject to corporate control. Opticians, on the other hand, to our knowledge, have not been subjected to similar restrictions. Pharmacists should not be either.

Another distinguishing feature is that the practice of dentistry, optometry or medicine does not require the substantial capital outlays that must be made by those going into the drug store business. Consequently, the ownership restrictions in the dentistry and optometry fields do not have the same competition inhibiting effect that the ownership restrictions in the pharmacy field have.

The three state court cases cited on pages 12 and 13 of the petitioner's brief can likewise be easily distinguished. For example, in *Magan Medical Clinic* v. *California State Bd. of Medical Examiners*, 57 Cal. Rptr. 256 (Cal. App. 1967), the contested California statute prohibited only doctors from owning pharmacies, obviously a much more limited prohibition than that effected by the North Dakota statute. Moreover, the record before the California trial and appellate courts contained evidence of substantial abuses by some doctors in California who did own pharmacies. 57 Cal. Rptr. at 260, fn. 1.

The Maryland appellate court case, *Brooks* v. *State Board of Funeral Directors and Embalmers*, 195 A.2d 728

(Md. App. 1963), involved funeral directors, not pharmacists, and prohibited any corporation from engaging in the business of funeral directing. Thus, only a particular kind of ownership was prohibited. The statute did not attempt to secure monopoly power over a particular type of business for a limited group of individuals.

The third case, *Superx Drugs Corp.* v. *Michigan Board of Pharmacy*, 146 N.W.2d 1 (Mich. 1966), has, as seen, an appropriate factual situation, but hardly supports the State Board's position since only one of the eight deciding judges found the statute both applicable and constitutional.

CONCLUSION

In conclusion, then, the record in this case clearly supports the conclusions of both the North Dakota trial court and the North Dakota Supreme Court that Section 43-15-35(5) of the North Dakota Century Code violates the due process clause of the Fourteenth Amendment to the United States Constitution, since the statute was shown to bear no reasonable relationship to the health, safety or welfare of the people of North Dakota. The decision of the North Dakota Supreme Court should be upheld.

Respectfully submitted,

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